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DISSERTATION

The Application of international human rights law to non-state armed groups in Ukraine

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Introduction

Following its secession from the Soviet Union in 1991, Ukraine has come to be one of the world's major geopolitical flashpoints¹. Situated on the frontier between the Russian Federation and the Eastern border of the North Atlantic Treaty Organization (NATO), Ukraine's short history has been fraught with political intrigues as Russia and its western rivals vied for influence and hegemony over the strategically important territory². The pivotal events of 2013 and 2014 escalated this political jostling and Ukraine was plunged into a civil war, which, at the time of writing, has been going on for over five years. Currently, Ukraine's legal territory is split; the southern peninsula of Crimea is now a de facto part of the Russian Federation, while two Russian-aligned separatist entities control most of the eastern provinces of Luhansk and Donetsk, known collectively as the Donbas (Donetsk Basin) and housing the majority of Ukraine's industrial infrastructure³. These entities, known as the Luhansk People's Republic (hereafter LPR) and the Donetsk People's Republic (hereafter DPR) have established parallel administrative structures in areas under their control, and masquerade as legitimate regimes, complete with penal codes, judicial processes and constitutions⁴. Although not a single UN member state recognizes these entities (including their main patron, Russia)⁵, they continue to exert control over 3.7 million inhabitants^{6,7} and take on the responsibilities of a legal government⁸. The crisis represented a significant flare up in tensions between Russia and the west, dubbed a 'new Cold War' by some observers, and the murky media coverage of the subsequent conflict exposed a clash of narratives with wide-reaching ramifications for the Ukrainian population⁹.

¹ Thomas D. Grant, *Aggression Against Ukraine: Territory, Responsibility and International Law* (Palgrave Macmillan, New York 2015) 1

² Richard Sakwa, *Frontline Ukraine* (I.B. Taurus and Co Ltd, London, 2015) 3

³ Ibid 4

⁴ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 19 September 2014, paragraph 5

⁵ Alec Luhn 'Ukraine's rebel 'people's republics' begin work of building new states' The Guardian (Donetsk 6 November 2014) <<https://www.theguardian.com/world/2014/nov/06/ukraine-rebel-peoples-republic-states>> accessed 4 September 2019

⁶ Population Count of the Donetsk People's Republic on 1 January 2018, Donetsk People's Republic Ministry of Interior Affairs

⁷ Population Count of the Luhansk People's Republic on 1 April 2018, Luhansk People's Republic Ministry of Interior Affairs

⁸ OHCHR Report 19 September 2014 (n 4) paragraph 163

⁹ Sakwa (n 2) Preface IX

This paper will focus on the human rights implications of the formation of these quasi-statelets. The first aspect discussed is that of classification, a key element in the attribution of responsibility for human rights violations¹⁰. If the Ukraine conflict can be considered an international armed conflict between Ukraine and Russia - a statement which would classify the separatist entities as de facto representatives of the Russian State - the responsibility for human rights obligations would clearly fall to the Russian government¹¹. However, if the Ukrainian conflict is classified as a non-international armed conflict, the human rights implications are less straightforward. The main reason for this is the fact that international law, in its conventional conception, is applied to states which are signatories to the relevant treaties, and largely does not address non-state entities such as rebel groups¹². Furthermore, it is becoming increasingly accepted that international law provides for the application of international humanitarian law to internal conflicts (as opposed to national law)¹³. The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Tadic case held that:

'International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole of the territory under the control of a party, whether or not actual combat takes place there.'¹⁴

The application of human rights law to such situations is less clear. However, with conventional conflicts between states becoming increasingly uncommon, recent developments in the literature of international law have expanded the scope of international law according to the reality of the situation.¹⁵ In many internal conflicts around the world - such as the civil wars in Sri Lanka, Syria, Colombia and

¹⁰ Daragh Murray *Human Rights Obligations of Non-State Armed Groups* (Haart Publishing, Portland 2016) 60

¹¹ Ibid 42

¹² Tilman Rodenhauser *Organizing Rebellion* (Oxford University Press, New York, 2018) 20

¹³ Tilman Rodenhauser 'Human Rights Obligations of Non-State ARmed Groups in Other Situations of Violence: The Syria Example.' *Journal of International Humanitarian Legal Studies*, 265

¹⁴ *Prosecutor v D. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the former Yugoslavia, 2 October 1995, para 70

¹⁵ Rodenhauser (n 13) 264

Ethiopia - armed groups have exercised control over territory and populations.¹⁶ If the treatment of the populations under control of armed groups is unregulated, the wellbeing of the affected civilians is entirely under the discretion of the armed groups, creating a vacuum in the application of international law. Furthermore, these conflicts often devolve into stalemates, with weakened government forces lacking the capacity to retake territory. In such situations, if the conflict 'freezes' and frontlines become static- as is the case in Ukraine with only one major escalation in the last four years¹⁷ - there is not much actual fighting taking place, making international humanitarian law less useful in such situations.

The traditional state-centric approach to international law stipulates a top down relationship between States and their constituents, in which the State is the sole party responsible for protecting the human rights of people under their jurisdiction.¹⁸ However, this view cannot fully protect the 'inherent dignity of the equal and inalienable rights of all members of the human family', particularly in situations of conflict against non-state armed groups.¹⁹ Armed groups by their very nature exist beyond state authority, making the state incapable of implementing its domestic law during such conflicts; as, in the state-centric view, armed groups are not subject to international regulation, this would imply that they are free to act as they please, leaving affected populations at their mercy. Andrew Clapham argues that human rights focus on protecting the individual from violations, rather than binding states to obligations.²⁰ The entitlements that a person has under international human rights law thus have to be protected from all entities which are capable of violating them²¹. To this end, it is pertinent to address human rights obligations to non-state armed groups and apply international human rights law to their areas of control.

This paper will look at the extent to which international law allows for non-state armed entities such as the DPR and LPR to possess human rights obligations, and the implications of the violations of human rights committed by these entities. It will begin with a historical overview of the situation, from Ukraine's independence, through the course of the conflict until the present day. The first chapter will

¹⁶ Murray (n 10) 5

¹⁷ Shaun Walker 'Ukraine clashes leave several dead and test Trump's Russia stance' (Moscow, 1 February 2017) <<https://www.theguardian.com/world/2017/feb/01/ukraine-clashes-leave-several-dead-and-test-trumps-russia-stance>> accessed 4 September 2019

¹⁸ Rodenhauser (n 13) 268

¹⁹ Ibid 269

²⁰ Andrew Clapham, 'The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement' SSRN eLibrary 2010, 24

²¹ Rodenhauser (n 13) 269

focus on the classification of the war in the east and discuss the implications of Russian involvement. The second chapter will then analyze the legal literature regarding human rights obligations of non-state armed entities, such as the DPR and LPR, and how they can be considered legal personalities, and thus liable for human rights abuses. The final chapter will highlight some of the high-profile cases of human rights violations committed by the separatist entities, which are symptomatic of wider problems within their administration, using reports from the OHCHR and various Ukrainian human rights-oriented NGOs. The conclusion will then discuss why these entities and their representatives should be held accountable for these violations occurring in the territory under their control.

Historical Overview

Although large swathes of modern-day Russia and Ukraine were a part of the same entity since medieval times, Ukrainian identity as distinct from Russia began developing in the 19th century, spearheaded by local intellectuals²². Following the Bolshevik Revolution of 1917, the modern boundaries of Ukraine were delineated with the formation of the Ukrainian Soviet Socialist Republic, one of 15 semi-autonomous republics which made up the Soviet Union²³. In 1954, Soviet leader Nikita Khrushchev (himself an ethnic Ukrainian) transferred the peninsula of Crimea from the Russian Soviet Socialist Republic to its Ukrainian counterpart²⁴.

Following the political liberalization of the 1980s, demands for Ukrainian secession from the Soviet Union increased, culminating in the December 1991 declaration of independence which created modern Ukraine²⁵. Despite initial optimism, the political situation changed little following the declaration of independence, as a new oligarch class, freshly rich off the looting of formerly state-owned industries (many of which were based in Donbas) came to dominate Ukrainian politics²⁶. The 2004 presidential election saw the first inklings of mass political action in modern Ukraine with the Orange Revolution²⁷. Large number of people protested against the outgoing president Leonid Kuchma and his handpicked

²² Serhy Yekelchuk, *The Conflict in Ukraine* (Oxford University Press, New York 2015) 16

²³ Ibid 17

²⁴ Ibid 51

²⁵ Sakwa (n 2) 8

²⁶ Taras Kuzio, *Putin's War Against Ukraine* (Create Space, Toronto 2017) 4

²⁷ Ibid 5

successor, Viktor Yanukovych, who had been accused of using fraudulent tactics to manipulate the results of the election²⁸. This mass action was initially successful, and led to the opposition candidate, Viktor Yuschenko assuming the presidency in 2005, despite suffering a poisoning²⁹. However, his reign lasted only one term, and in 2010, Kuchma's former opponent Viktor Yanukovych, with a large support base in the Donbas region was elected president of Ukraine³⁰.

The protests of November 2013, dubbed Maidan (Ukrainian for 'square' or 'open space'), were sparked when the Yanukovych administration reneged on an Association Agreement with the European Union in favor of closer ties with the Russian-led Customs Union³¹. Activists camped out in Kiev's Independence Square for months and the situation grew increasingly violent, as authorities attempted to break it up³² and apparent provocations from extremist elements within the opposition. The violence reached its zenith from February 18³³; gunfights erupted between protesters and police and by the 20th, 77 protesters and 17 police officers were killed³⁴. On February 27, Yanukovych abdicated his post and was granted asylum in Russia, from where he denounced the protests as a 'neo-Nazi coup'³⁵.

The same day, Russian special forces, operating without insignia, began their bloodless conquest of Crimea by seizing key infrastructure and disarming Ukrainian army units in the peninsula³⁶. Already a semi-autonomous region within Ukraine prior to the Russian occupation, the Crimean parliament hastily organized a referendum which was held on March 16, with reportedly 96.77 percent of the population voting to secede from Ukraine and become a part of the Russian Federation³⁷.

Following the secession of Crimea, Ukraine's eastern regions saw increasing agitation against the new government in Kiev³⁸. On April 7th, the Donetsk People's Republic was declared by protesters occupying regional administration buildings³⁹. April 12 marked the official beginning of the Donbass War,

²⁸ Yekelchik (n 22) 90-91

²⁹ Ibid 92

³⁰ Sakwa (n 2) 55-56

³¹ Yekelchik (n 22) 104

³² Sakwa (n 2) 81

³³ Yekelchik (n 22) 109

³⁴ Sakwa (n 2) 88

³⁵ Yekelchik (n 22) 112

³⁶ Grant (n 1) 2

³⁷ Ibid 17-18

³⁸ Sakwa (n 2) 148

³⁹ Ibid 150

when armed pro-Russian militants seized government buildings throughout Donetsk and Luhansk provinces⁴⁰. On April 27, the Luhansk People's Republic was established and the self-declared 'people's governor' of Luhansk announced the formation of the Donbas People's Army, led by Russian national and alleged former FSB⁴¹ officer Igor Strelkov (born Igor Girkin)⁴². By May, the entire Donbas was in open revolt⁴³. On May 11, the insurgents announced a referendum on self-determination in the Donbas, with turnouts in Donetsk and Luhansk reportedly 75 percent, with 89 and 96 percent of the voters choosing independence respectively⁴⁴.

With the Ukrainian Army woefully unprepared for any kind of conventional conflict, the Interior Ministry formed the Ukrainian National Guard, essentially a collection of private militias financed by pro-Maidan oligarchs⁴⁵. Several of these units, particularly the Azov and Aidar Battalions used overt neo-Nazi symbols and rhetoric and were largely comprised of members of the far right groups which had given momentum to the Maidan protests⁴⁶. The insurgents were characterized as 'terrorists' by the Kiev government and a counter-attack was mounted from late May⁴⁷. Despite attempts at peace talks in June, the fighting continued with surprising intensity. By August, the insurgents were on the retreat, with some 3,000 people killed and over a million displaced⁴⁸. From the beginning of armed hostilities, allegations of Russian involvement swirled, charges which the Russian government denied⁴⁹. However, the Ukrainian counteroffensive was significantly slowed by early September, particularly after the bloody Battle of Ilovaisk where a 50,000-strong Ukraine force was routed by the insurgents, an event which suggested

⁴⁰ Mark Rachkevych, 'Armed pro-Russian extremists launch coordinated attacks in Donetsk Oblast, seize regional police headquarters, set up checkpoints' Kyiv Post (Kiev, 12 April 2014) <https://www.kyivpost.com/article/content/war-against-ukraine/armed-pro-russian-extremists-seize-police-stations-in-donetsks-slavyansk-shaktarysk-fail-to-take-donetsk-prosecutors-office-343195.html> accessed 6 September 2019

⁴¹ *The Russian state security service and successor of the Soviet KGB

⁴² Sakwa (n 2) 150

⁴³ Ibid 151

⁴⁴ Shaun Walker, Oksana Grytsenko and Howard Amos 'Ukraine: pro-Russia separatists set for victory in eastern region referendum' The Guardian (Donetsk, Luhansk and Kiev, 12 May 2014) <https://www.kyivpost.com/article/content/war-against-ukraine/armed-pro-russian-extremists-seize-police-stations-in-donetsks-slavyansk-shaktarysk-fail-to-take-donetsk-prosecutors-office-343195.html> accessed 6 September 2019

⁴⁵ Sakwa (n 2) 157

⁴⁶ Ibid 158-159

⁴⁷ Ibid 160

⁴⁸ Ibid 172

⁴⁹ Ibid 156

greater Russian involvement⁵⁰. Reports circulated in Russian media of funerals of elite paratroopers from the 76th Airborne Division in Pskov⁵¹ while non-military Russian volunteers fighting on the side of the insurgents openly admitted to coming from Russia to 'fight fascism' in Ukraine⁵². Despite the signing of the first Minsk Protocol on September 5⁵³, fighting continued into 2015, until the signing of Minsk II protocols in February 2015⁵⁴. At this point, the Ukrainian offensive had stalled and the insurgents had managed to capture some of the territory they had lost since May, and deal costly defeats to the Ukrainian Army and National Guard⁵⁵.

Over the course of the fighting, the separatist territories had been taking on the former functions and responsibilities of the Ukrainian state in areas under their control.⁵⁶ The 19 September, 2014 OHCHR report from Ukraine makes the first mention of the establishment of 'parallel governance structures' by insurgents, with ministries, judiciary systems and a criminal code being devised⁵⁷. In November, the DPR held parliamentary elections and Aleksandr Zakharchenko, a former leader of an insurgent detachment won the prime ministership⁵⁸. As the fighting died down following the signing of Minsk II, the war had devolved into a stalemate, with the depleted Ukrainian military incapable of advancing further and the insurgents content with consolidating the gains they had made⁵⁹. From this point, the DPR and LPR became de facto states within the legal territory of Ukraine.

⁵⁰ Ibid 174

⁵¹ Anna Dolgov, 'Defense ministry dismisses reports of Russian paratroopers killed in Ukraine' The Moscow Times (Moscow, September 30 2014) <<https://www.themoscowtimes.com/2014/09/30/defense-ministry-dismisses-reports-of-russian-paratroopers-killed-in-ukraine-a39904>> accessed September 6 2019

⁵² Alec Luhn 'Preparing for war with Ukraine's fascist defenders of freedom' Foreign Policy (Mariupol, August 30 2014) <<https://foreignpolicy.com/2014/08/30/preparing-for-war-with-ukraines-fascist-defenders-of-freedom/>> accessed September 6 2019

⁵³ Sakwa (n 2) 175

⁵⁴ Ibid 244

⁵⁵ Ibid 178

⁵⁶ OHCHR Report 19 September 2014 (n 4) paragraph 163

⁵⁷ Ibid paragraph 164

⁵⁸ Sakwa (n 2) 244

⁵⁹ Ibid 178

Part I: Classification of the Ukraine Conflict

A key element in the attribution of human rights obligations in the Ukraine conflict is the classification of the conflict: first as an actual armed conflict; and second as either a **non**-international armed conflict between the government of Ukraine and rebels, or an international armed conflict between Ukraine and Russia.

Common Article 3 to the Geneva Conventions does not provide a definition of non-international armed conflict, only stating that it applies to internal conflicts.⁶⁰ Additional Protocol II to the Geneva Conventions, made specifically to refer to non-international armed conflicts defines them as the following:

‘...armed conflicts which...take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.’⁶¹

In this definition, a number of key elements are identified: organization and responsible command, exercise control over territory, and military capacity of armed groups. In 1995, the International Criminal Tribunal for the former Yugoslavia (ICTY), in the prosecution of Dusko Tadic, provided a concrete definition of armed conflict that ‘has been repeated in virtually every subsequent judicial decision as well as by the scholars.’⁶² In its decision, the ICTY formulates the following definition of armed conflict:

‘...whenever there is a resort to armed force between States or protracted armed violence between governmental and organized armed groups or between such groups within a State.’⁶³

⁶⁰ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1949) Article 3

⁶¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (1977)

⁶² Agnieszka Szpak ‘Legal classification of the armed conflict in Ukraine in light of international humanitarian law’ (2017) 3 *Hungarian Journal of Legal Studies* 261, 265

⁶³ *Prosecutor v D. Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* 70

This definition has been used by the International Criminal Court (ICC) in its prosecution of DRC rebel leader Thomas Lubanga Dyilo and by the Special Tribunal for Sierra Leone in the Sesay, Kallon and Gbao case.⁶⁴ The Trial Chamber in the Tadic case then devised a two-part test to establish the existence of an armed conflict: the intensity of the conflict and the organization of the parties to the conflict.⁶⁵ This test was created to distinguish full scale armed conflicts from sporadic acts of violence, banditry or terrorism, which would be regulated by national law.⁶⁶

According to Daragh Murray, 'Satisfaction of the intensity requirement is necessarily dependent upon the actions of other actors engaged in the hostilities, and not solely upon the activity of the group itself'.⁶⁷ In the Boskoski Case, the ICTY identified a number of factors to determine the intensity of an armed conflict. These include, inter alia, the seriousness of armed attacks, the amount of territory affected by the violence, the mobilization of government troops, the attention of the UN security council, the number of victims, the type of weapons used and the occupation of territory.⁶⁸

The conflict in Ukraine unequivocally satisfies this intensity requirement. The first major engagement of the war was seen in the Ukrainian military operation to retake the city of Sloviansk from armed insurgents in April 2014.⁶⁹ In this battle, at least three Ukrainian helicopters were shot down, proving the use of heavy weapons from the very onset of hostilities.⁷⁰ The conflict came to engulf the entirety of the Donetsk and Luhansk provinces, satisfying the territorial factor of the intensity criterion. The continuing occupation of large parts of the mentioned provinces and the 3.5 million population of the separatist territories satisfies the occupation criterion.⁷¹⁷² As of January 2019, 13,000 people had been killed in the conflict, with 1.3 million people internally displaced as of June 2015.⁷³ Finally, the re-

⁶⁴ Szpak (n 61) 265

⁶⁵ Murray (n 10) 60

⁶⁶ Ibid 60

⁶⁷ Ibid 61

⁶⁸ *Prosecutor v L. Boskoski, J. Tarculovski (Judgment)* (International Criminal Tribunal for the former Yugoslavia) 175-186

⁶⁹ Lidia Khaustova 'Sloviansk, where the Donbass war started five years ago' Kyiv Post (Sloviansk 24 April 2019) <<https://www.kyivpost.com/ukraine-politics/sloviansk-where-donbas-war-started-5-years-ago-sees-peaceful-election.html>> accessed 6 September 2019

⁷⁰ Sakwa (n 2) 150

⁷¹ DPR Population Count (n 6)

⁷² LPR Population Count (n 7)

⁷³ Dmitro Gubenko 'UN: Casualties of the conflict in Eastern Ukraine reaches 13,000 people' Deutsche Welle (Kiev 1 January 2019) <<https://www.dw.com/uk/%D0%BE%D0%BE%D0%BD->

establishment of the Ukrainian National Guard in April 2014, in response to the woeful state of the Ukrainian military (which was also compromised by the presence of pro-Russian soldiers⁷⁴) satisfies the mobilization requirement: Interior Ministry troops (under which the National Guard operates) had their numbers grow from 10,000 before the war to over 35,000 by July 2014, reinforcing 77,000 regular troops.⁷⁵ Furthermore, the Ukrainian government implemented a 1.5% war tax on July 31, 2014, another indicator of the seriousness of the conflict.⁷⁶

The intensity requirement is heavily correlated with the organization requirement devised by the ICTY.⁷⁷ Despite this, there remains a lack of specificity to what exactly the organization requirement entails.⁷⁸ Citing the principle of effectiveness, Murray writes that ‘...there is general consensus that the degree of organization, although ostensibly minimal, must be sufficient to allow the group to fulfil any applicable international humanitarian law obligations. This capacity to fulfil international obligations must appropriately be regarded as dependent upon the existence of an internal structure, capable of exerting authority over its members.’⁷⁹ The Boskoski Trial Chamber interpreted the organization criterion as the ability of the leadership of a group to exercise some control over its members and grouped the indicators of organization into five broad categories:

- Factors signalling the existence of a command structure
- Factors indicating that the group could carry out operations in an organized manner
- Factors indicating a level of sophistication with respect to logistics
- Factors indicating internal discipline
- Factors indicating the ability to speak with ‘one voice’⁸⁰

[%D0%B6%D0%B5%D1%80%D1%82%D0%B2%D0%B0%D0%BC%D0%B8-%D0%BA%D0%BE%D0%BD%D1%84%D0%BB%D1%96%D0%BA%D1%82%D1%83-%D0%BD%D0%B0-%D1%81%D1%85%D0%BE%D0%B4%D1%96-%D1%83%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D0%B8-%D1%81%D1%82%D0%B0%D0%BB%D0%B8-%D0%BC%D0%B0%D0%B9%D0%B6%D0%B5-13-%D1%82%D0%B8%D1%81%D1%8F%D1%87-%D0%BB%D1%8E%D0%B4%D0%B5%D0%B9/a-47172250>](#) accessed 6 September 2019

⁷⁴ Sakwa (n 2) 157

⁷⁵ Ibid 165

⁷⁶ Ibid 165

⁷⁷ Murray (n 10) 61

⁷⁸ Ibid 61

⁷⁹ Ibid 61

⁸⁰ *Prosecutor v Boskoski and Tarculovski* (n 67) para 199-203

With many of these categories overlapping, Murray writes that they can be subsumed into one 'essential criterion: the existence of a responsible command'. This requires a military-like structure in the armed groups, complete with a hierarchy and chain of command.⁸¹

Again, the nature of the separatists in Ukraine fully satisfies this criterion. The self-proclaimed 'people's governor' of Luhansk, Valery Bolotov appointed Russian national Igor Girkin as commander of the Donetsk People's Army.⁸² The insurgent forces had a clear chain of command, with identifiable leaders of smaller detachments, such as Mikahil 'Givi' Tolstykh,⁸³ Arsen 'Motorola' Pavlov⁸⁴ and Aleskandr Zakharchenko, the latter of whom was elected prime minister of the DPR in November 2014.⁸⁵ Furthermore, the sophistication of the insurgents in their initial offensives of April to May 2014 indicate a level of organization;⁸⁶ a ramshackle group of bandits would not have been able to capture the same amount of territory. This is without mentioning their subsequent victories over the Ukrainian Army in Ilovaisk,⁸⁷ Debaltseve⁸⁸ and the Donetsk Airport;⁸⁹ Russian involvement in these battles, however, is likely. Additionally, the short-lived decision taken in May 2014 to integrate the territories of the LPR and DPR into the joint union of Novorossiya suggests a high level of coordination and cooperation among separatist leadership.⁹⁰

Having established that the events in Ukraine meet the threshold to be considered an armed conflict, the specific character of the conflict will now be discussed. Although the conflict takes place wholly within the legal territory of Ukraine, an internal armed conflict can become internationalized when a

⁸¹ Murray (n 10) 63

⁸² Sakwa (n 2) 150

⁸³ Olga Zhukova 'Givi: I was taught to battle by Chapaev and Ukraine' Komsomolskaya Pravda (Donetsk 8 February 2017) <<https://www.kp.ru/daily/26641.4/3659603/>> accessed 6 September 2019

⁸⁴ Andrew E. Kramer 'Bomb kills pro-Russian rebel commander in Eastern Ukraine' The New York Times (Kiev 17 October 2016) <https://www.nytimes.com/2016/10/18/world/europe/ukraine-rebel-arsen-pavlov-motorola-killed.html?_r=0> accessed 6 September 2019

⁸⁵ Sakwa (n 2) 244

⁸⁶ Ibid 150

⁸⁷ Ibid 174

⁸⁸ Alec Luhn and Oksana Grytsenko 'Ukrainian soldiers share horrors of Debaltseve battle after stinging defeat' The Guardian (Artemivsk, Luhanske, 18 February 2015) <<https://www.theguardian.com/world/2015/feb/18/ukrainian-soldiers-share-horrors-of-debaltseve-battle-after-stinging-defeat>> accessed 6 September 2019

⁸⁹ Alan Taylor 'A year of war completely destroyed the Donetsk airport' The Atlantic (Donetsk, 26 February 2015) <<https://www.theatlantic.com/photo/2015/02/a-year-of-war-completely-destroyed-the-donetsk-airport/386204/>> accessed 6 September 2019

⁹⁰ Sakwa (n 2) 150

third State militarily intervenes on the side of the non-state armed group, or has sufficient control over the anti-government party.⁹¹ With Russian involvement undeniable in the conflict in Ukraine (by the leadership of the insurgencies' own admission),⁹² this is a key element in identifying who is burdened with human rights responsibilities. To determine the internationalization of the armed conflict, two tests can be applicable: the effective control test and the overall control test.⁹³ There has been some controversy over the applicability of which test to specific circumstances, with the International Court of Justice (ICJ) preferring to use the effective control test and the ICTY using the overall control test in its judgements on Tadic and Boskoski.⁹⁴ The overall control test seems to be more specialized to determine the internationalization of a non-international armed conflict and better reflects recent international jurisprudence on the matter.

The effective control test was devised by the ICJ in its judgement on Nicaragua in 1986.⁹⁵ In this case, the Nicaraguan socialist government was facing a civil war against a collection of right-wing militias known as the contras, who were supported by the United States.⁹⁶ This case was about the attribution of responsibility of the United States for violations of international humanitarian law. In its ruling, the ICJ stated that,

'United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets and the planning of the whole of its operation, is still insufficient in itself...for the purpose of attributing to the United States the acts committed by the contras...All the forms of United States participation mentioned above and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights...Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give

⁹¹ Hans-Peter Gasser, 'Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon' (1983) 33 Am U L Rev 145

⁹² Sakwa (n 2) 174

⁹³ Robert Heinsch 'Conflict Classification in Ukraine: the Return of the 'Proxy War'?' (2015) 91 Int'l L. Stud. 323

⁹⁴ Szpak (n 61) 270

⁹⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ reports 1986

⁹⁶ Szpak (n 61) 267

rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.⁹⁷

This imposes a high standard for the attribution of internationally wrongful acts committed by a non-state actor to a State. In other words, the effective control test requires not only the financing and equipping of a non-state actor, but also the direct supervision and guidance in the specific wrongful act in question. The effective control test was the standard for judging the extent of the involvement of third party States to a non-international armed conflict until the ICTY Tadic appeals judgement.⁹⁸

The ICTY Trial Chamber had to establish whether the armed conflict in question (in this case involving the Bosnia and Yugoslavia) was international in character.⁹⁹ The circumstances of the case are similar to those in the Ukraine conflict, with Yugoslav Serb forces allegedly supporting ethnic Serbs fighting against the Bosnian government.¹⁰⁰ The ICTY argued that the effective control test was not equally applicable to every situation. The Appeals Chamber of the case held that,

‘...control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or

⁹⁷ *Nicaragua v. United States of America* (n 94) paragraph 115

⁹⁸ Szpak (n 61) 270

⁹⁹ Ibid 268

¹⁰⁰ Ibid 268

members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.’¹⁰¹

This introduces a lower threshold. Essentially, the Appeals Chamber of the ICTY holds that control required by international law is sufficient when the State party in question has any role in the organizing coordinating or planning of activities of a non-state armed group. It scrapped the necessity dictated by the effective control test that the outside State provided detailed direction to the armed group in question. This can be summed up as the overall control test.

Robert Heinsch writes that ‘Although still controversial in some ways, the overall control test nevertheless has become the accepted standard in international courts and tribunals when it comes to the classification of armed conflicts.’¹⁰² As the effective control test was made in different circumstances - that is attributing specific internationally wrongful acts of a non-state armed group to a third party State, rather than the classification of the armed conflict - the overall control test is more relevant in its application to the Ukraine conflict.

Thus, the Ukraine conflict can thus be categorized as one of two types of armed conflict: an international armed conflict between Ukraine and Russia; or a non-international armed conflict between the government of Ukraine and separatists. However, the conflict can also be internationalized if, under the overall control test, the separatists are shown to be under the authority of Russia.

The Ukrainian government characterizes its operations in the Donbass as an ‘anti-terrorist operation’ responding to ‘armed aggression of the Russian Federation against Ukraine involving both regular Armed Forces of the Russian Federation and illegal armed groups guided, controlled and financed by the Russian Federation.’¹⁰³ Amnesty International characterized it as an international armed conflict,¹⁰⁴ while the ICRC¹⁰⁵ and Human Rights Watch both described the conflict as non-international. A

¹⁰¹ *Prosecutor v. Tadic (Judgment)* (International Criminal Tribunal for the former Yugoslavia) (1999) paragraph 123

¹⁰² Heinsch (n 92) 344

¹⁰³ ICCPR ‘Statement of the Verkhovna Rada of Ukraine’ 5 June 2015

¹⁰⁴ Amnesty International ‘Ukraine: mounting evidence of war crimes and Russian involvement’ Amnesty International (7 September 2014) <<https://www.amnesty.org/en/latest/news/2014/09/ukraine-mounting-evidence-war-crimes-and-russian-involvement/>> accessed 6 September 2019

¹⁰⁵ Anastasia Isyuk and Andre Loersch ‘Ukraine: ICRC calls on all sides to respect international humanitarian law’ ICRC (August 23, 2014) <<https://www.icrc.org/en/doc/resources/documents/news->

classic international armed conflict would require the use of armed forces of two sovereign States. Despite numerous reports in (mainly Western) media about the involvement of regular Russian Army troops, details are murky and often contradictory.¹⁰⁶ In the book *Frontline Ukraine* (year), Richard Sakwa writes that 'Although it became axiomatic in much of the West that the insurgency was financed and sponsored by Russia, evidence of this before August (2014) is far from conclusive.'¹⁰⁷ 'Proof' provided by western sources of the deployment of regular Russian troops is largely based on shoddy evidence, such as social media posts of alleged Russian soldiers and 'common sense'.¹⁰⁸ There is a complete lack of convincing evidence that regular Russian formations have conducted 'significant and continuous military action', an essential element in the determination of an international armed conflict, according to ICTY jurisprudence.¹⁰⁹ With there being political motivations on both sides to obscure the truth - Russia completely denying the presence of its regular troops and Ukraine and its western allies exaggerating it - one should err on the side of caution when characterizing the conflict. At the moment, there is little concrete evidence of the long-term involvement of the Russian Army in the Ukraine conflict. The undoubted presence of Russian volunteers in the Donbass, as admitted by the late DPR president Alexander Zakharchenko - an unconventional collection of Cossacks, Chechen paramilitaries, Orthodox nationalists, monarchists and Stalinists¹¹⁰ - does not make the conflict an international one, even if these volunteers likely crossed the border to Ukraine with the blessings of the Russian government.

Thus, if it cannot be established conclusively that this is an international armed conflict, the alternative would be to classify it as non-international. As mentioned earlier, the intensity of the conflict and the degree of organization of the separatists makes this comfortably pass the threshold required by APII and the test devised in the Tadic ruling. This would be the easiest classification of the Ukraine conflict. However, the possibility of the 'internationalization' of the conflict has to be discussed, using the overall control test. Again, there is no convincing evidence that the Russians participated in planning and

[release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm](https://www.bbc.com/news/world-europe-25484444)> accessed 6 September 2019

¹⁰⁶ Sakwa (n 2) 155

¹⁰⁷ Ibid 156

¹⁰⁸ Ibid 175

¹⁰⁹ Prosecutor v Rajic and Andric, Case No. IT-95-12-R61 (International Criminal Tribunal for the former Yugoslavia September 13, 1996)

¹¹⁰ Sakwa (n 2) 174

coordinating military activities of the separatists. The mere provision of arms, financing and training is not sufficient to establish liability, according to the overall control test.¹¹¹ Furthermore, the presence of Russian volunteers again is not enough to prove overall control over the separatists from the Russian government. The fact that a consistent complaint of the separatists is the lack of supplies and support from Russia, and separatist commander Igor Girkin accusing Russia of 'betraying' their allies suggests that the separatists had slightly differing aims from Russia.¹¹² Furthermore, the assassination of several DPR and LPR commanders in the following years - including Mikhail 'Givi' Tolstykh, Arsen 'Motorola' Pavlov¹¹³ and even the president of the DPR, Aleksandr Zakharchenko - is widely believed to have been done by the Russian government.¹¹⁴ Although these accusations are as lacking in concrete evidence as assertions of continuous involvement of Russian regular troops in the Donbass, their persistence weakens the claim that the separatists are complete proxies of Russia. In the end, the lack of certainty about the full scale of Russian involvement is the biggest element in discounting the conflict as an international one. Shane R. Reeves and David Wallace argue that the conflict is non-international, stating,

'Russia is, undoubtedly, involved in the ongoing Ukraine civil war. Though they consistently deny these accusations, there is overwhelming evidence showing the Russians actively equipping, training and even fighting alongside the separatists in eastern Ukraine. Yet it is difficult to determine the full extent and scope of their control of the separatists, as the Russian-backed rebels are seemingly independent actors. Without more evidence to clarify the Russian-separatists relationship, it is not known whether Russia is exercising a sufficiently high degree of control over the separatists to internationalize the well-established non-international armed conflict. Given this challenge and because of the overwhelming evidence

¹¹¹ Prosecutor v Tadic (n 100) paragraph 123

¹¹² Michael Weiss 'All is not well in Novorossiia' Foreign Policy (12 July 2014) <<https://foreignpolicy.com/2014/07/12/all-is-not-well-in-novorossiia/>> accessed 6 September 2019

¹¹³ The Moscow Times 'Pro-Russian guerrilla commander commander Mikhail 'Givi' Tolstykh assassinated in Donetsk' The Moscow Times (Moscow 8 February 2017) <<https://www.themoscowtimes.com/2017/02/08/pro-russian-guerilla-commander-assassinated-in-ukraine-a57076>> accessed 6 September 2019

¹¹⁴ Marc Bennetts 'Rebel leader Alexander Zakharchenko killed in explosion in Ukraine' The Guardian (Moscow 31 August 2018) <<https://www.theguardian.com/world/2018/aug/31/rebel-leader-alexander-zakharchenko-killed-in-explosion-in-ukraine>> accessed 6 September 2019

supporting the existence of a non-international armed conflict, this article considers the situation in eastern Ukraine to qualify as the latter.¹¹⁵

At last, the only conclusion one can reach regarding the classification of the Ukraine conflict based on concrete evidence is that it is a non-international armed conflict. This is despite the obvious fact that the rebels are, by their own admission, supported by Russia. Despite this, the only definitive conclusion one can reach with the evidence readily available is that the separatists are independent actors.

Part II: The Application of Human Rights Obligations to the DPR and LPR

Legal Framework

This paper will now discuss to what extent the international legal framework allows for non-state entities such as the DPR and LPR to hold human rights obligations. As stated earlier, in its earliest conception, human rights was formulated to govern the relationship between a recognized State and its subjects.¹¹⁶ This followed from the proliferation of European-style nation states around the world, with Nigel Rodley arguing that human rights emerged as ‘the historical response to the rise of the modern nation state’.¹¹⁷ This conception imposes both positive and negative obligations on States; the State is obliged to respect human rights by refraining from abusing them, to protect the human rights of its constituents from abuse by other entities, and to fulfil its obligations through actions.¹¹⁸ There are several practical benefits to this approach: under traditional conceptions of state sovereignty, where the State is the primary arbiter in its internal affairs, it becomes the main potential violator of human rights, as well as the entity most capable of protecting them. Furthermore, international law is traditionally considered as regulating relations between States; as they themselves are the signatories, it is obvious that they would consider themselves the primary subjects of such laws.

¹¹⁵ Shane Reeves, Rob Barnsby, ‘The New Griffin of International Law: Hybrid Armed Conflicts’ (2015) Harvard IR <<http://hir.harvard.edu/article/?a=3045>> accessed 6 September 2019

¹¹⁶ Rodenhauser (n 13) 268

¹¹⁷ Nigel Rodley ‘Can Armed Opposition Groups Violate Human Rights?’ in Andrew Clapham (ed), *Human Rights and Non-State Actors* (Edward Elgar Publishing Limited, Cheltenham 2013) 835

¹¹⁸ Tilman Rodenhauser, *Organizing Rebellion* (Oxford University Press, Oxford 2018) 117

Despite this, there are gaps in accountability under this model. First of all, under international law, States can't normally be held responsible for human rights violations by private actors. The only time a State can be held accountable for human rights violations of a non-state armed group is when it is found that the State did not take adequate measures to protect its constituents from its violations. In these circumstances, it is only acts of omission which can be attributed to the state. The most glaring gap in this model is seen in situations of internal conflict. Such a model presupposes the existence of a stable state with a strong law enforcement system; however, such states normally do not face internal conflicts. According to Tilman Rodenhauer, 'the very existence of a non-state armed group suggests that the territorial state is unable fully to enforce its authority.'¹¹⁹ Although, as mentioned in the introduction, the Tadic ruling in the ICTY established the application of international humanitarian law into internal armed conflicts,¹²⁰ this is not enough for a number of reasons. International humanitarian law is only concerned with the conduct of hostilities and regulating what military actions are and aren't acceptable.¹²¹ This completely fails to address the welfare of civilians living under the control of armed groups, a situation which has become increasingly common as interstate conflicts have decreased in frequency and internal conflicts with powerful non-state entities becoming the norm of modern war. IHL does not provide any guidance to how non-state armed groups govern territories under their control, creating a legal vacuum.¹²² Furthermore, the state-centric model, by its very definition, does not address non-state entities.

Attempting to bridge this gap, article 29 of the Vienna Convention on the Law of Treaties stipulates that 'a treaty is binding upon each party in respect of its entire territory'.¹²³ Despite this, the European Court of Human Rights (ECtHR) acknowledged the limitations of such an approach, in a case involving factors similar to those seen in Ukraine. In a judgment on events related to the Russian-supported secession of Transnistria in Moldova, the ECtHR stated:

'This presumption (of the territorial application of human rights law) may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory.

¹¹⁹ Ibid 144

¹²⁰ *Prosecutor v D. Tadic* (n 14) paragraph 70

¹²¹ Murray (n 10) 11

¹²² Ibid

¹²³ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, Article 29

That may be a result of military occupation by the armed forces of another State which effectively controls the territory concerned, acts of war or rebellion, or the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned.¹²⁴

Despite this statement, the Court opined that States have the obligation to take 'diplomatic, economic, judicial or other measures that is in its power' to re-establish control over the territory in question and perform their human rights obligations.¹²⁵ However, the capability of States to re-establish control over lost territory is not always there. In Ukraine, the State is prevented by its commitments in the Minsk protocols, as well as its lack of a clear military advantage over the separatists from re-establishing control over the Donbas, making it impractical to expect them to do so. This is without mentioning how paradoxical it would be to expect a State to start a military operation, in which human rights violations are all but guaranteed, in the name of fulfilling human rights obligations.

However, in recent years, international law has been moving away from such a top-down conception of human rights, where States are the sole duty holders and individuals are the passive recipients. The Universal Declaration of Human Rights, the foundational document of this entire subset of international law, makes few mentions of States, instead embodying individual entitlements.¹²⁶ Rodenhauer claims that the UDHR was 'not intended to define state obligations' and 'human rights are better understood as individual entitlements which protect human beings against any attack on inherent rights and dignities.'¹²⁷ This focus on the inherent dignity is particularly relevant, with the Vienna Declaration and Programme of Action formed during the World Conference on Human Rights stating 'that all human rights derive from the dignity and worth inherent in the person'.¹²⁸ Going on this premise that international human rights law is made to protect the individual, it logically follows that any entity capable of exercising authority over individuals should be regulated. Furthermore, the principle of effectiveness necessitates that law is applicable not only in theory but also according to the reality of the situation. Hans

¹²⁴ *Ilascu and others v Moldova and Russia*, Judgment 8 July 2004, Application no 48787/99 ECtHR, paragraph 312

¹²⁵ Ibid paragraph 331

¹²⁶ Universal Declaration of Human Rights, 1948

¹²⁷ Rodenhauer *Organizing Rebellion* (n 118) 127

¹²⁸ Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 25 June 1993, preamble

Kelson argues that ‘a legal order, as a whole, must be by and large effective in order to be valid’;¹²⁹ if there are situations where laws are inapplicable to real situations on the ground, the entire premise underlining their authority is weakened. According to Katharine Fortin, the inapplicability of the state-centric human rights protection system to situations of internal conflict is a ‘fundamental part of understanding how and why armed groups may bear obligations under international law in particular circumstances.’¹³⁰ In order for human rights law to be effective, it will have to bridge this gap between theoretical state obligations and the reality of the situation in regards to internal conflicts and non-state armed groups.

Recent international legislation has reflected this evolving paradigm. As mentioned earlier, the ECtHR, in the *Ilascu* case, acknowledged the limitations of state authority in times of internal conflict. However, in the ruling of that case, it still called upon States to do everything in their power to secure human rights. In *Sargsyan v Azerbaijan*, another case overseen by the ECtHR, the Court found that the limitation of States’ human rights responsibilities was only acceptable if this ‘was compensated by the finding that another Convention State exceptionally exercised jurisdiction outside its territory and thus had full responsibility under the Convention’¹³¹, citing ‘the need to avoid a vacuum in Convention protection.’¹³² While this implies that States human rights obligations can only be limited if they are taken up another State, the Court clarified that such limitations can also be applicable to territory ‘under the effective control of another entity’,¹³³ which, in the Court’s words, could be ‘armed forces of another State’ or ‘a separatists regime’.¹³⁴ This quite clearly provides for the application of human rights law to separatist regimes exercising control over a part of a State’s territory. Other UN human rights bodies have taken similar stances. The UN Committee on Economic, Social and Cultural Rights (ESCR), in a report on human rights in Iraq (which, at the time, had a large part of its territory controlled by ISIS/ISIL) acknowledged that the Iraqi State was ‘unable to ensure that the Covenant rights are fully implemented in

¹²⁹ Hans Kelsen, *Principles of International Law* (Rinehart and Co 1952) 414

¹³⁰ Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017) 201

¹³¹ *Sargsyan v Azerbaijan, Judgment, 16 June 2015, Application no 40167/06*, ECtHR, paragraph 148

¹³² *Ibid*

¹³³ *Ibid* paragraph 149

¹³⁴ *Ibid* paragraph 148

the entirety of its territory';¹³⁵ however, it also stated that 'it (the Iraqi State) must strive to the extent possible to meet its obligations under the Covenant'¹³⁶. These rulings show that although a State's human rights obligations are not dormant in situations of internal conflict, limitations are a reality and the provision that States have to fulfil their obligations 'to the greatest extent possible' shows the acknowledgement of these limitations, and the implication that State obligations can exist in parallel to non-state armed group obligations.

Other international legislation has become increasingly addressed to non-state armed groups. In 2009, several UN officials in a report on the 'Human Rights Situation in Palestine and other Occupied Arab Territories' argued that 'non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.'¹³⁷ This was addressed to Hamas, a non-state armed group which exercises authority over the Gaza strip. In another report on the situation in Gaza, a UN human rights council argued that although Hamas is not a signatory to human rights treaties, 'the Gaza authorities have an obligation to respect and enforce the protection of the human rights of the people of Gaza, inasmuch as they exercise effective control over the territory.'¹³⁸ Hamas was found responsible for failing to secure the Gazan peoples' right to food, and for not investigating allegations of their members committing extrajudicial killings¹³⁹. The report also found that Hamas's human rights obligations ran in parallel to Israel's obligations as an occupying power, and the Palestinian Authority's obligations as a de facto power¹⁴⁰. Similar judgements can be seen in Human Rights Council (HRC) reports on Libya. Following the deposition of Muammar Gaddafi, some of the armed groups involved in his downfall formed the National Transitional Council (NTC) as an interim authority.¹⁴¹ Although this is more of an example of State succession, the wording of the HRC reports confirm the applicability to situations like those seen in

¹³⁵ Un Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fourth Periodic Report of Iraq*, 27 October 2015, E/C.12/IRQ/CO/4 paragraph 5

¹³⁶ Ibid

¹³⁷ Human Rights Council, *Human Rights Situation in Palestine and other Occupied Arab Territories*, 29 May 2009 paragraph 22

¹³⁸ Human Rights Council, *Human Rights Situation in Palestine and other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 25 September 2009 paragraph 1369

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Rodenhauser *Organizing Rebellion* (n 118) 166

Ukraine. The HRC stated that because the NTC 'has been exercising de facto control over territory akin to that of a governmental authority, it will examine also allegations of human rights violations committed by its forces.'¹⁴² This reinforces the ruling on Hamas; it identifies territorial control and de facto authority as key elements in the attribution of human rights obligations to non-state armed groups.

This concept that international human rights law is binding on non-state entities finds more support in the *Sadiq Shek Elmi v Australia* case, overseen by the Committee against Torture. This concerned a Somali warlord accused of human rights violations, including torture, which would constitute a violation of the Convention Against Torture. Article 1 of the Convention states that torture requires 'the consent or acquiescence of a public official or other person acting in an official capacity'. As some of the armed groups in Somalia exercised de facto control over territory, and 'exercise(d) certain prerogatives that are comparable to those normally exercised by legitimate governments', the Committee held that 'the members of those factions can fall, for the purposes of the application of the Convention, within the phrase "public officials or other persons acting in an official capacity" contained in article 1'.¹⁴³ Again, the jurisprudence identifies the key element of de facto control and non-state actors acting in quasi-official categories as key determinants in the applicability of human rights obligations to such groups.

Furthermore, there are legal conceptual arguments supporting this. There is an argument to be made that States create human rights obligations for third parties, with or without the latter's consent¹⁴⁴. There is an already established notion that states create obligations for every individual under international criminal law¹⁴⁵. Thus, it follows that states should be able to create human rights obligations for individuals. This is further explained by the theory of prescriptive jurisdiction. This concept holds that any treaty which a State becomes a party to is binding on all entities in that State's territory¹⁴⁶. The Commentary on the Additional Protocols explains this further, stating that 'the commitment made by a State not only applies to the government but also to any established authorities and private individuals

¹⁴² Human Rights Council, *Report of the International Commission of Inquiry to Investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya* 1 June 2011 paragraph 72

¹⁴³ *Sadiq Shek Elmi v Australia*, CAT/C/22/D/120/1998

¹⁴⁴ Rodenhauer, *Organizing Rebellion*, (n 118) 117

¹⁴⁵ Ibid

¹⁴⁶ Murray (n 10) 106

within the national territory of that State and certain obligations are therefore imposed upon them'.¹⁴⁷ The territorial element in this is key. Rodenhauser writes that '...human rights treaty obligations devolve with territory. Under this approach, it is argued that IHRL treaties that apply in a state would be an expression of the principle of effectiveness, meaning that the factual situation would significantly influence the applicable legal framework.'¹⁴⁸

Such an approach takes into consideration the continuity of human rights obligations and the continuity of the rights themselves.¹⁴⁹ The former deals more with situations of state succession, and for this reason is not relevant to this paper.¹⁵⁰ The latter is heavily correlated with the aforementioned principle that human rights constitute sets of entitlements for individuals, and not obligations for states.¹⁵¹ In Rodenhauser's words, 'IHRL treaties have a rather declaratory function, not creating but rather confirming already existing rights, which apply irrespective of IHRL treaties.'¹⁵² He goes on to argue that it would be contradictory to the spirit of human rights if individuals lose these protections just by their immediate authority figures changing hands.¹⁵³ This finds some support in UN statements. The UN Committee on Human Rights held the following, in regards to the International Covenant on Civil and Political Rights (ICCPR):

'The rights enshrined in the Covenant belong to the people living in the territory of the State party...Once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.'¹⁵⁴

Despite this, it can still be argued that because human rights treaties aren't addressed to illegal territorial authorities or non-state armed groups, this line of argumentation is not enough to justify the

¹⁴⁷ *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (The Hague, Martinus Nijhoff, 1987) 1345

¹⁴⁸ Rodenhauser, *Organizing Rebellion* (n 118) 172

¹⁴⁹ Ibid

¹⁵⁰ Ibid

¹⁵¹ Ibid 173

¹⁵² Ibid 174

¹⁵³ Ibid

¹⁵⁴ Human Rights Committee, *General Comment No 26: Continuity of Obligations*, 8

application of human rights obligations to such entities.¹⁵⁵ However, again, it must be stressed, according to the principle of effectiveness, that legislation must be flexible and applicable to real life situations in order to be valid and effective. Thus, 'the effectiveness of international law, and the effective protection of individuals' human rights require that these treaties bind not only de jure governments, but also entities filling the role of a vertical authority.'¹⁵⁶ Therefore, it can be established that if human rights are entitlements of the individual, then treaty obligations bind any entity within a signatory's State's territory, including non-state armed groups. However, this does introduce a gap when a State is not a signatory to a particular treaty. This gap can be filled by the final way that international law allows for non-state actors to be bound by human rights obligations: customary law¹⁵⁷.

It is already established in international jurisprudence that customary norms of human rights law can bind non-state entities.¹⁵⁸ This is arguably a more effective way of binding non-state armed groups than forcing them to comply with treaties signed by the State party which they are fighting against. The UN International Commission of Inquiry on Darfur argued that:

'All insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the rules of customary international law on internal armed conflict referred to above.'¹⁵⁹

The concept of international legal personality introduced above is particularly pertinent to the Ukraine conflict, where the separatist parties have a degree of organization and quasi-statehood not seen in most armed groups. Although the above quote only refers to international humanitarian law, its provisions can be applied to human rights law as well, citing the aforementioned arguments of the principle of effectiveness and the need to protect all individuals from human rights violations.

This section has shown how international jurisprudence allows for non-state armed groups to possess human rights obligations. The rulings regarding Gaza, Libya and Darfur - alongside the conclusions reached in the *Elmi v Australia* case - all identify the de facto authority of armed groups as an

¹⁵⁵ Rodenhauer, *Organizing Rebellion* (n 118) 175

¹⁵⁶ Ibid

¹⁵⁷ Ibid 176

¹⁵⁸ Ibid

¹⁵⁹ United Nations Secretary, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (United Nations 2005) paragraph 172

essential element in attributing human rights responsibility to them. As the DPR and LPR, through their declarations of independence in April 2014 certainly consider themselves the de facto authorities in the territories under their control, these provisions are undoubtedly applicable to them. Furthermore, international law binds international legal persons to their provisions; if it can be proven that the elements of the Ukrainian separatist territories allow them to be considered legal personalities, then it is irrevocable that they can be subject to human rights obligations. Because of this, the factors indicating their international legal personality warrants closer examination.

International Legal Personality of the DPR and LPR

According to Murray, 'the direct attribution of international rights or obligations to a non-state armed group is dependent upon international legal personality'¹⁶⁰. Despite this, the concept of which entities can acquire legal personality is still murky. The Oxford Dictionary of Law defines international legal persons as 'distinct, independent actors, who possess direct rights or obligations under international law'.¹⁶¹ The aforementioned traditional view of international law being a state-centric system conflated statehood with international legal personality; however, this does not accurately reflect the true nature of international legal personality.¹⁶²

Common article 3(4) of the Geneva Conventions is key in distinguishing international legal persons from actual States. Drafted to address the extension of international law to internal conflicts¹⁶³ (which, at the time, had been viewed as falling entirely under domestic law), it holds that 'the application of the preceding provisions shall not affect the legal status of the Parties to the conflict'.¹⁶⁴ According to Murray, this provision was included for two purposes: to assure States that the attribution of international law obligations to non-state armed groups would not grant the armed groups legitimacy, and not constitute international recognition of these groups.¹⁶⁵ Furthermore, this article precludes the recognition

¹⁶⁰ Murray (n 10) 23

¹⁶¹ Jonathan Law and Elizabeth A Martin (eds), *Oxford Dictionary of Law* 5th edn (Oxford, Oxford University Press, 2002)

¹⁶² Murray (n 10) 25

¹⁶³ Ibid 26

¹⁶⁴ Article 3, Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950)

¹⁶⁵ Murray (n 10) 35

of belligerent status to members of armed groups, so that captured insurgents can be tried as criminals and not treated as prisoners of war.¹⁶⁶ Commentary to Additional Protocol II to the Geneva Conventions (which was made specifically to internationally govern internal conflicts) states that the Protocol's 'implementation does not constitute recognition of belligerency'.¹⁶⁷ According to G.I.A.D Draper, the application of article 3 'in no way constitutes any legal by the de jure government of the rebel party, nor limits the former's right to quell the rebellion and punish, in accordance with its laws, the criminal acts committed by those who took part in it.'¹⁶⁸

Although some states interpreted Article 3(4)'s legal status clause as precluding the international legal personality of armed groups, this is also not wholly accurate.¹⁶⁹ It is more accurate to find that although the granting of belligerent status would automatically result in legal personality of the armed groups, the States raising concerns to the international regulation of internal conflicts were more concerned about their ability to quell an insurrection, rather than the armed groups' acquisition of legal personality.¹⁷⁰ Thus, Murray argues, 'an interpretation that precludes armed groups' international legal personality does not emerge clearly from the text of Article 3(4) itself'.¹⁷¹ He goes on to assert that 'for Article 3(4) to explicitly preclude such personality would contradict the very object and purpose of common Article 3 as a whole, namely the application of international legal obligations to armed opposition groups.'¹⁷²

Having established that there is nothing in international law which precludes armed groups from acquiring international legal personality, it is necessary to delineate the conditions for acquiring such status. It must first be noted, however, that international law does not having any specific rules regarding which entities can and can't acquire this status.¹⁷³ Because of this, Murray argues that a functional approach is most pertinent to 'ensure the greatest possible symmetry between international life and the

¹⁶⁶ Ibid 37

¹⁶⁷ Yves Sandov, Christophe Swinarski and Brun Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (The Hague, Martinus Nijhoff, 1987) 1344

¹⁶⁸ GIAD Draper, *The Red Cross Conventions* (London, Stevens and Sons, 1958) 103

¹⁶⁹ Murray (n 10) 39

¹⁷⁰ Ibid 40

¹⁷¹ Ibid

¹⁷² Ibid

¹⁷³ Ibid 48

legal system which purports to regulate it.¹⁷⁴ Contemporary international law states three criteria for an entity to gain international legal personality: the entity in question must exist independently, it must be capable of possessing direct international rights or obligations, and it must actually be in possession of these rights or obligations.¹⁷⁵

The independence requirements is satisfied if it can be demonstrated that there is no exclusive superior authority to the armed group in question, and that no other entity is capable of acting as a medium.¹⁷⁶ This does not imply that partial control of an armed group by a third party precludes the armed group's independence; as long as this control is partial, and not total, the armed group can be considered to be independent.¹⁷⁷ This element is particularly relevant to the separatist entities in Ukraine, as will be discussed later. The capacity requirement is heavily correlated with an armed group's organizational characteristics.¹⁷⁸ Having a clear chain of command with an identifiable leadership is essential in an armed group's ability to fulfil human rights obligations.¹⁷⁹ According to Murray, this capacity is 'recognized as dependent upon its (the armed group's) ability to bind the individuals under its command, which in turn is dependent upon the existence of a command and control structure',¹⁸⁰ reflecting the organization criterion discussed in Part I in relation to the classification of an internal dispute as a non-international armed conflict. Finally, the actual possession of rights and obligations is concerned with the factual situation an entity finds itself in.¹⁸¹ Murray poses the example of a drug gang to show how just having organizational characteristics of an armed group doesn't necessarily mean that the entity has actual rights or obligations; a drug gang will have very different aims to an armed group attempting to exercise authority over a population.¹⁸² Thus, the actual possession criterion is based on the fact of the entity exercising, or showing its intent to exercise human rights obligations.

The DPR and LPR meet all these criteria. Perhaps the most difficult to prove in their case is the independence requirement. However, as mentioned in Part One, there is a lack of convincing evidence to

¹⁷⁴ Ibid

¹⁷⁵ Ibid 42

¹⁷⁶ Ibid 43

¹⁷⁷ Ibid

¹⁷⁸ Ibid 44

¹⁷⁹ Ibid

¹⁸⁰ Ibid

¹⁸¹ Ibid 45

¹⁸² Ibid

suggest that Russian involvement in the Donbass War has been sustained and continuous.¹⁸³

Furthermore, the numerous disagreements the insurgent leaders have with Russia - most notably their apparent intention to join the Russian Federation the way Crimea did, something which Moscow clearly never intended for them to do¹⁸⁴ - shows that they are not complete pawns of Russia. Although Russia does undoubtedly support and sponsor the separatist territories, supplying military equipment, paramilitary volunteers and financial support, this does not make them dependent on Russia¹⁸⁵. There is legal precedent for this; the Turkish Republic of North Cyprus, which was established with open support from regular Turkish armed forces during the 1974 war, is considered to exist independently¹⁸⁶.

For the capacity requirement, there are three main factors to be considered: the existence of a responsible command, the capacity to carry out a widespread attack and the exercise of territorial control.¹⁸⁷ All three of these factors are present in the Ukrainian separatist entities. Sakwa writes that by August, the 'rebel forces had established a single command structure over their 15,000 personnel, with a general staff deploying brigades and battalions. They had also learned from strategic manuals how to conduct encircling operations, creating so-called 'cauldrons', and to cut off advancing hostile forces from supplies and reinforcements...'.¹⁸⁸ The multiple rebel victories over the Ukrainian Armed Forces stand testament to the rebels' capacity. Finally, the territorial factor is satisfied by the insurgents controlling the majority of Donetsk and Luhansk provinces, including the capital cities of each region. Furthermore, the fact that the DPR and LPR inherited the infrastructure and institutions of the Ukrainian state is another indicator of their capability to hold and implement human rights obligations.

Finally, the actual possession criterion is satisfied by proving that international law can and does apply to such entities.¹⁸⁹ The previous section detailed how international law applies to such groups; international jurisprudence relating to Gaza, Libya, Transnistria and Darfur all established that armed groups exercising territorial control and authority over a population should be bound by international

¹⁸³ Reeves and Barnsby 'The New Griffin of International Law: Hybrid Armed Conflicts' (n 115)

¹⁸⁴ Sakwa (n 2) 178

¹⁸⁵ Ibid 174

¹⁸⁶ Murray (n 10) 43

¹⁸⁷ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber, International Criminal Court, Case No ICC-01/09, 31 March 2000, paragraph 93

¹⁸⁸ Sakwa (n 2) 174

¹⁸⁹ Fortin (n 130) 168

human rights law. The prescriptive jurisdiction theory also applies a basis for the application of human rights obligations to armed groups like the DPR and LPR.

Thus, it has been established that the Ukrainian separatist entities unequivocally meet the threshold to be considered international legal personalities. Their independence from Russia, their high degree of organization and hierarchy, and the international jurisprudence allowing them to possess rights and obligations proves this. This is perhaps the strongest facet of the argument that they ought to be held to the standards delineated in international human rights treaties. If an entity possesses international legal personality, it is automatically bound by the provisions of international law. Furthermore, their aspirations for statehood indicate a willingness to comply with norms of international law. All of these factors together make it clear that according to international law, these entities should, and do, possess human rights obligations.

Part III: Human Rights Violations of the DPR and LPR

Having established the applicability of international human rights law to the armed groups in Ukraine, this paper will now look at several categories of persistent human rights abuses by the separatist entities. The majority of the information in this section is taken from reports made by the OHCHR's Human Rights Monitoring Mission in Ukraine, which compiles reports every three months of the human rights situation across Ukraine. There are also numerous videos published online - often by the armed groups themselves - of them conducting human rights violations which will also be discussed here. This paper will look at three main categories of human rights violations which appear most frequently in the OHCHR reports: torture, the denial of freedom of religion and dignified treatment in detention.

Freedom of Religion in the DPR and LPR

The right to freedom of religion is embodied in Article 18(1) of the ICCPR, which Ukraine is a party to. It states that,

'Everyone shall have the right to freedom of religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.'¹⁹⁰

General comment 22 to the ICCPR expands on this. It states that the Article 'does not permit any limitations on whatsoever on the freedom...to have or adopt a religion of one's choice.'¹⁹¹ The Committee goes on to explain that individuals have the right to manifest their chosen religion in worship, and that this worship extends to actual places of worship, like churches.¹⁹² Furthermore, the Committee explains that the 'use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert' is explicitly banned under the covenant.¹⁹³ This is an embodiment of the principle of equality and nondiscrimination commonly seen across international human rights law. The European Convention on Human Rights (ECHR) reinforces this with its Article 9, which provides for the same type of freedom of religion.¹⁹⁴

In a statement issued on March 10, 2015, Aleksandr Zakharchenko, the 'prime minister' of the DPR, announced that the only religions that would be recognized in the DPR's jurisdiction would be Orthodox Christianity, Catholicism, Islam and Judaism.¹⁹⁵ He went on to threaten to 'brutally fight sects',¹⁹⁶ referring to western deviations of Christianity which are foreign to the region, such as Jehovah's Witnesses, Baptists, Mormons and Protestants in general.¹⁹⁷ In the address, he also mentioned that

¹⁹⁰ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UnTS 171 (ICCPR) Article 18

¹⁹¹ UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: <https://www.refworld.org/docid/453883fb22.html> [accessed 8 September 2019] paragraph 3

¹⁹² Ibid paragraph 4

¹⁹³ Ibid paragraph 5

¹⁹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (ECHR) Article 9

¹⁹⁵ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 15 August 2015, paragraph 83

¹⁹⁶ Fraz.ua 'Zakharchenko only knows 4 religions. There will be no space for Buddhism, Hinduism or Shintoism in the DPR' Fraz (Donetsk 21 May 201) <https://fraz.ua/video/223295-zaharchenko_znaet_tolko_4_religii_nikakim_buddizmam_induizmam_i_sintoizmam_v_dnr_ne_mesto> accessed 9 September 2019

¹⁹⁷ OHCHR report 15 September 2015 (n 195) paragraph 5

Buddhism and Hinduism 'do not have a place in the Donetsk People's Republic'.¹⁹⁸ This warning came against the backdrop of atrocities committed by the insurgents against these 'sects'. During the Battle of Slavyansk in June 2014, militants from the DPR battalion 'Russian Orthodox Army' murdered four members of the Pentecostal church,¹⁹⁹ apparently for religious reasons. Although those executions, however reprehensible, can be seen as an isolated incident done in the early stages of the insurgency, when levels of organization were lower, and not a reflection of the policy of the leadership, the statement by Zakharchenko exposes ideological positions in the separatists that is in clear opposition to human rights. The implied threat of force in the statement and the explicit rejection of all but 4 religious denominations is a violation of the right to freedom of religion of the minority religions the DPR leader referred to.

Practice by the separatists evidences further violations of this right. The February 2015 OHCHR report mentions an incident where five ministers of the Jehovah's Witnesses church were arrested and taken before an unnamed DPR commander, where they were accused of 'betraying the Orthodox Faith'.²⁰⁰ According to the report, the ministers were beaten and subjected to mock executions, before being released and told that they would be executed if they continued their religious practices.²⁰¹ The August 2015 report mentions a similar incident, where 4 Jehovah's Witnesses members were abducted in the town of Novoazovsk, subjected to mock executions and told to 'acknowledge Orthodoxy as the only true religion'.²⁰² In yet another incident, occurring in January 2016, 3 members of the same denomination were kidnapped in Horlivka by DPR authorities, with families learning the next day that the men were arrested for 'being a part of an extremist organization'.²⁰³ Again, this coercion and violence exerted on religious grounds is a clear violation of Article 18 of the ICCPR and Article 9 of the ECHR. Furthermore,

¹⁹⁸ Fraza.ua (n 195)

¹⁹⁹ Dmitry Fionik 'Ascent. Who killed 4 Christians in besieged Slavyansk.' Focus (29 August 2018) <<https://focus.ua/ukraine/314132>> accessed 9 September 2019

²⁰⁰ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 15 February 2015, paragraph 66

²⁰¹ Ibid

²⁰² Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 15 August 2015, paragraph 84

²⁰³ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 3 March 2015, paragraph 123

the criminalization of the minority denominations, as evidenced by the aforementioned 'extremism' related arrests is an open example of discrimination.

By August 2015, the OHCHR reported that 12 Jehovah's Witnesses churches had been taken over by armed groups, with the representatives of the DPR stating that they would never be returned to the minority religious group, and would be 'turned into more important things, like gyms.'²⁰⁴ The LPR followed the DPR's example in discriminating against minority Christian groups. On August 25, 2015, four Jehovah's Witnesses ministers in Luhansk were interrogated for 6 hours, after which they were forced to confess to being foreign agents, and forbidden from publicly practicing their religion or distributing religious literature, the latter being a large part of the denomination's praxis.²⁰⁵ The parishioners were threatened with arrests or high fines if they continued publicly practicing their religion.²⁰⁶ This denial of places of worship, and banning of religious practices violates Article 18 of the ICCPR, particularly the provision in the Commentary which extends protection to places of worship and manifestations of faith, such as preaching. In response to these incidents, the OHCHR made the following statement:

'OHCHR reiterates its concerns about statements issued by representatives of the 'Donetsk people's republic' declaring their intention to "combat the sects", as indicative of a policy of religious persecution of persons belonging to denominations other than Orthodox Christianity, Catholicism, Islam and Judaism.

Under international customary law and article 4 of Additional Protocol II to the Geneva Conventions, the right to freedom of religion or belief and the right not to be subjected to discrimination on any grounds, including religious affiliation, and should be respected by all parties to a conflict, including armed groups.'²⁰⁷

²⁰⁴ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 15 August 2015, paragraph 85

²⁰⁵ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 9 December 2015, paragraph 71

²⁰⁶ Ibid

²⁰⁷ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 3 March 2016 paragraph 125

The Protestant denominations are not the only ones facing such issues. The OHCHR reported that the Ukrainian Orthodox Church of the Kiev Patriarchate was facing intimidation in the LPR.²⁰⁸ With Ukraine's Orthodox community divided into the autocephalous Kiev Patriarchate and the larger Moscow Patriarchate, the separatist territories favor the latter, making the Russian Orthodox Church the 'state religion' in both territories.²⁰⁹ The OHCHR report mentioned a Kiev patriarchate priest testifying that his parishioners 'did not feel safe at their places of worship and were sometimes the target of insults from local residents and armed groups.'²¹⁰ Furthermore, the OHCHR reported on a protest in January 2016 against the Greek Catholic Church (identical in practice to the Ukrainian Orthodox Church, other than its allegiance to the Vatican)²¹¹, which was allegedly sponsored and organized by local authorities.²¹²

These incidents of violence and coercion against members of religious minorities constitute violations of the right to freedom of religion. These acts also amount to discrimination on religious grounds, which is a prohibited category of discrimination and thus violates the principles of equality and non-discrimination. The statements by officials show clear inclinations that are contrary to the spirit of human rights and show a worrying facet of the authority of the separatist groups.

Torture Committed by DPR and LPR Forces

Freedom from torture is seen as a non-derogable right in international human rights law, meaning that it is not tolerated in any circumstances. Article 7 of the ICCPR holds that 'no one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.'²¹³ This provision is reinforced by the UN Convention Against Torture (UNCAT). This treaty, to which Ukraine is a signatory, defines torture in its first Article as,

²⁰⁸ Ibid paragraph 127

²⁰⁹ Kuzio (n 26) 300

²¹⁰ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 3 March 2016 paragraph 131

²¹¹ Kuzi (n 26) 301

²¹² Ibid paragraph 124

²¹³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UnTS 171 (ICCPR) Article 7

‘...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’²¹⁴

During the peak of the fighting from 2014-2015, there have been countless reports of torture conducted by separatist forces on Ukrainian soldiers and civilians. While this falls more under international humanitarian law - having happened in the midst of active hostilities, and largely committed against members of the armed forces - it nonetheless constitutes a violation of human rights and exposes deeper structural problems within the ranks of the separatists due to its widespread nature. The September 2014 OHCHR report stated that ‘Armed groups continued to terrorise the population in areas under their control, pursuing killings, abductions, torture, ill-treatment and other serious human rights abuses, including destruction of houses and seizure of property.’²¹⁵ According to a report by a Polish NGO, quoted by Ukrainian-British academic Taras Kuzio, a staggering 87 percent of Ukrainian service members and 50 percent of civilian detainees reported being tortured while in the custody of the armed groups.²¹⁶ Female service members have been repeatedly threatened with rape, with the captors occasionally acting on the threats.²¹⁷

²¹⁴

UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html> [accessed 9 September 2019]

²¹⁵ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 19 September 2014, paragraph 16

²¹⁶ Kuzio (n 26) 305

²¹⁷ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 3 June 2016, paragraph 52

An early high-profile case showcasing such practices by the armed groups is seen in the murder of Volodymyr Rybak in April 2014.²¹⁸ A deputy of the Horlivka City Council (Horlivka being a town currently under the control of the DPR), he was abducted after raising a Ukrainian flag with his body found in a river days later, showing signs of 'severe torture'.²¹⁹ In the same town, two young men, 19-year-old Yuri Popravko and 25-year-old Yuri Dyakovskyy were also accused of pro-Ukrainian views and were executed by insurgents, with both their bodies showing signs of torture.²²⁰

Another high-profile case exposing such practices is seen in the Battle of Donetsk Airport. According to the June 2015 OHCHR report, a group of 12 Ukrainian soldiers was captured.²²¹ After being beaten for hours, the DPR commander (and Russian national) Arsen 'Motorola' Pavlov singled out a soldier named Ihor Branovitskiy. Branovitskiy was beaten with a blunt object for 'hours' before allegedly being personally executed by Pavlov.²²² A leaked audio recording has also surfaced with a man who sounds like Pavlov openly talking about torturing and murdering captured Ukrainian soldiers.²²³ That Pavlov was given a hero's funeral after his assassination in 2016²²⁴ implies that the authorities sanction such actions and that they are not the result of a lack of organization or coordination among the rank and file troops.

There are also videos - often published by the separatist groups themselves, or at least pro-separatist channels - showing the abuse and mistreatment of Ukrainian prisoners of war. In one particularly disturbing video taken during the Battle of the Donetsk Airport, the famed DPR commander

²¹⁸ Kuzio (n 26) 306

²¹⁹ BBC, 'Ukraine alert as politician killed' BBC (22 April 2014) <<https://www.bbc.co.uk/news/world-europe-27118875>> accessed September 10 2019

²²⁰ Kuzio (n 26) 305-306

²²¹ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 1 June 2015, paragraph 31

²²² Ibid

²²³ Oleg Sukhov, 'Russian fighter's confession of killing prisoners might become evidence of war crime (AUDIO)' Kyiv Post (6 April 2015) <<https://www.kyivpost.com/article/content/war-against-ukraine/kremlin-backed-fighters-confession-of-killing-prisoners-might-become-evidence-of-war-crimes-audio-385532.html?cn-reloaded=1>> accessed September 10 2019

²²⁴ Shaun Walker, 'Prominent rebel warlord Arseny "Motorola" Pavlov dies in Donetsk Blast' The Guardian (Moscow 17 October 2016) <<https://www.theguardian.com/world/2016/oct/17/prominent-warlord-arsen-motorola-pavlov-killed-donetsk-blast>> accessed 10 September 2019

Mikhail 'Givi' Tolstykh is seen talking to a group of captured Ukrainian soldiers.²²⁵ He hits the commanding officer in the face with a pistol and cuts off the flags from the lapels of the soldiers before forcing them to chew on the flag.²²⁶ The prisoners of war, many of whom appear to be wounded, are then paraded around Donetsk city, in front of crowds of civilians yelling obscenities.²²⁷ This kind of torture and humiliation of soldiers who are *hors de combat* - meaning not anymore actively participating in combat - violates the Convention Against Torture and several tenets of customary international humanitarian law.

In another video, insurgents interrogate a blindfolded young man who they accuse of being a Ukrainian soldier, despite him not wearing any uniform.²²⁸ Towards the end of the video, the interrogator points a pistol to the young man's head and demands that he confess, before emptying the magazine next to the young man's head.²²⁹ The young man becomes hysterical and insists that he was not a soldier and is a local resident.²³⁰ Again, this type of callousness against the civilian population is completely contradicting the tenets of human rights law and amounts to psychological torture. Such mock executions seem to be a recurring theme in the separatists' treatment of detained persons, as evidenced by the aforementioned cases and the treatment of Jehovah's Witnesses explained in the previous section. There have also been disturbing reports of Ukrainian soldiers being castrated by insurgents, with many of these committing suicide after their release.²³¹ OHCHR has also reported receiving photographs of dead Ukrainian soldiers, whose corpses had visible signs of torture.²³²

Such incidents are not limited to soldiers, or to the peak of the active hostilities from 2014 to 2015. Prisoners who had been detained in the separatist-controlled territories prior to the outbreak of the war reported to OHCHR that conditions worsened when the separatists took control of the prisons, with

²²⁵ World News 'Givi Breaks Down Captured Cyborgs' 28 January 2015<<https://www.youtube.com/watch?v=W0jv9X6856k>> accessed 10 September 2019; *'Cyborgs' in this case refers to the colloquial nickname given to Ukrainian soldiers who were defending the Donetsk airport

²²⁶ Ibid

²²⁷ Ibid

²²⁸ PI Win 'Aug 2014 Near Ilovaisk. Interrogation of Ukrainian soldier' <<https://www.youtube.com/watch?v=V3TXtB80vT0&t=329s>> accessed 10 September 2019

²²⁹ Ibid

²³⁰ Ibid

²³¹ Kuzio (n 26) 310

²³² Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 1 June 2015, paragraph 33

inmates being subjected to more regular beatings and stints in freezing isolation cells.²³³ In the August 2015 report, OHCHR reported on a Ukrainian priest who, upon driving to a checkpoint controlled by insurgents, was subjected to a mock execution, beaten and detained for another 50 days, where he was subjected to more torture, all on the suspicion that he had been bringing food to Ukrainian forces.²³⁴

All the mentioned incidents fall under the threshold to be considered as full-fledged examples of torture. That there are so many reports of this - with evidence, often from the insurgents' own sources - indicates a level of consent to the commission of such acts, which is unacceptable under international human rights law. Furthermore, that it appears to be even higher-ranking members of the insurgent ranks committing such acts - there exists a video of Aleksandr Zakharchenko lamenting that he cannot shoot all the Ukrainian soldiers in his captivity²³⁵ - shows that this is a structural problem within the DPR, and not a consequence of poor discipline or control over rank and file troops. These are some of the most disturbing stories emerging from this conflict, and many of these incidents constitute not only violations of the right to freedom of torture, but also violations of the right to life, another non-derogable human right.

Human Rights Violations Against Detained Civilians in the LPR and DPR

Civilians who have been detained for various reasons by separatist authorities are regularly subjected to human rights violations. The parallel justice systems and administrative structures that the LPR and DPR have established since their formation give their judicial proceedings a superficial veneer of legitimacy; however, the factual reality of the situation shows that there are severe issues in the implementation of their 'justice', from the reasons given for arresting certain civilians, to the treatment of inmates in detention centers.

The separatist entities practice a policy of 'administrative arrest', a 30-day period of detention where victims are not informed of their charges, are not allowed contact with their families and are

²³³ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 15 June 2014, paragraph 51

²³⁴ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 15 August 2015, paragraph 45

²³⁵ Kuzio (n 26) 308

forbidden access to a lawyer.²³⁶ Although these 'administrative arrests' are only allowed to last 30 days, they are frequently and arbitrarily extended.²³⁷ This violates Article 14 of the ICCPR. Article 14(3) of the Convention states that everyone who is detained shall 'be informed promptly and in detail...the nature and cause of the charge against him.'²³⁸ Article 14(4) then provides the right for a detained person to have legal assistance.²³⁹ The practice of administrative arrest violates both these tenets of the ICCPR.

As mentioned earlier, inmates who had been detained in separatist-controlled territories prior to the start of the conflict reported a deterioration in conditions in the prisons. In the OHCHR's December 2015 report, an inmate reported that although conditions in prison were better in 2015 than the previous year, the facilities suffered from 'overcrowding, insufficient nutrition and lack of medical equipment'.²⁴⁰ It was further reported that there have been cases of inmates dying due to a lack of medical attention.²⁴¹ In the March 2016 OHCHR reports, two inmates reported that their prison was deprived of water and electricity for the months of January and February, that inmates were only allowed one cold shower per month and had to pay for food other than bread and porridge.²⁴² This violates Article 10(1) of the ICCPR which holds that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the person.'²⁴³

Finally, there are high-profile cases which highlight the inadequacy of the judicial and criminal systems in the separatist entities. One journalist, Maria Varfolomeieva was held from January 2015 to March 2016 simply for photographing apartment buildings damaged by the fighting.²⁴⁴ While in detention, she was not allowed any contact with her family and friends and was repeatedly beaten by male

²³⁶ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 15 March 2017, paragraph 43

²³⁷ Ibid

²³⁸ ICCPR (n 213) Article 14

²³⁹ Ibid

²⁴⁰ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 9 December 2015, paragraph 39

²⁴¹ Ibid paragraph 40

²⁴² Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 3 March 2016, paragraph 58

²⁴³ ICCPR (n 213) Article 10

²⁴⁴ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, 9 December 2015, paragraph 59

guards.²⁴⁵ Again, the basis of her arrest - for just photographing buildings as part of her job - and the conditions of her detention, where she was regularly subjected to physical violence and denied contact with the outside world, are violations of Article 10 and Article 14 of the ICCPR. This feeds into a broader pattern of penal facilities in the DPR and LPR being completely substandard when it comes to complying with human rights obligations.

Conclusion

Despite the evolving paradigm of international law, the direct application of rights to non-state entities remains shrouded in uncertainty. Although none of the major international human rights treaties directly address armed groups, it has recently been argued that human rights are better thought of as entitlements of individuals rather than obligations for States. Despite States remaining the primary players on the international stage, and the biggest subjects of international law, the recent proliferation of powerful, organized non-state armed groups has necessitated the devolution of human rights obligations unto entities challenging state authority. International jurisprudence reflects this; from the application of international humanitarian law to internal armed conflicts, it is clear that international law is trending towards directly addressing non-state actors like the DPR and LPR in regards to their human rights obligations. This is for the benefit of individuals; the alternative model, in which only States can be bound by human rights obligations, arguably gives a *carte blanche* to armed groups to act as they please without fear of international consequences or reprisals. By expecting them to operate on the same moral and humanitarian standards as their State adversaries, international law better protects the tens of millions of people who find themselves under the authority of such entities.

Circumstances specific to the Ukraine conflict further complicate the issue. The highly political nature of the accusations of Russian involvement make it unclear who is really in control of the separatist entities. If the Ukrainian and western governments' claims of the Donbass War being a Russian invasion of a sovereign country, then it would be much easier to attribute the human rights obligations of the insurgents onto the Russian government. However, the reality is more complicated and the rebellion seen in Donbass is certainly a primarily homegrown phenomenon, despite the undoubted Russian support. The

²⁴⁵ Ibid

full extent of this support remains unknown - the Ukrainian government seems to suggest that every engagement which they lost is due to the presence of the actual Russian Army. However, the fact that one does not hear much about casualties of Russian soldiers in Russia (which always have to be acknowledged by a State and are virtually impossible to keep fully secret) suggests that Russian support is limited at best. Both the effective and overall control tests are pertinent here, despite it being unideal for there to be two different tests to determine a very similar outcome. At the end of the day, under both the overall and effective control tests, from the facts that can be objectively confirmed, it is most easy to classify this conflict as a non-international armed conflict between the post-Maidan Ukrainian government and the Russian-backed separatists in Donetsk and Luhansk.

With this classification in mind, the organizational characteristics of the separatist entities are key in determining how human rights obligations can fall on them. That they function as normal states - with a Constitution, a pension, a criminal code, and a parliament - shows that they have the ability to perform these functions. Furthermore, the fact that they control the majority of two major Ukrainian provinces and have a population of 3.7 million people between them makes them impossible to ignore when it comes to human rights obligations. With judgments in various international legal bodies increasingly expecting entities like the DPR and LPR to comply with human rights norms, the criteria for legal personality is largely met, making them automatically bound by international law.

Despite this, human rights abuses abound in the territories under their jurisdiction. For international law to be more effective in protecting the inherent dignity of people living under the control of such groups, the actual treaties themselves should start unambiguously imposing obligations on non-state armed groups. The current approach, a mixture of theoretical legal concepts, practical considerations and customary law remain too vague and arguable for international human rights law to be effectively implemented in this situation. To this end, the departure from the state-centric conception of international law should be hastened. With interstate conflicts becoming more and more rare, the world is set to endure more situations like that seen in Ukraine and international human rights law has to keep up with these developments if it is to accomplish its goal of securing the dignity and worth of every individual.

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¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UnTS 171 (ICCPR) Article 18

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